

QUEEN'S BENCH,
APPEAL SIDE.

JOHN ATKINS ET AL.,

Appellants,

AND

THE QUEEN'S BULLION SOCIETY,

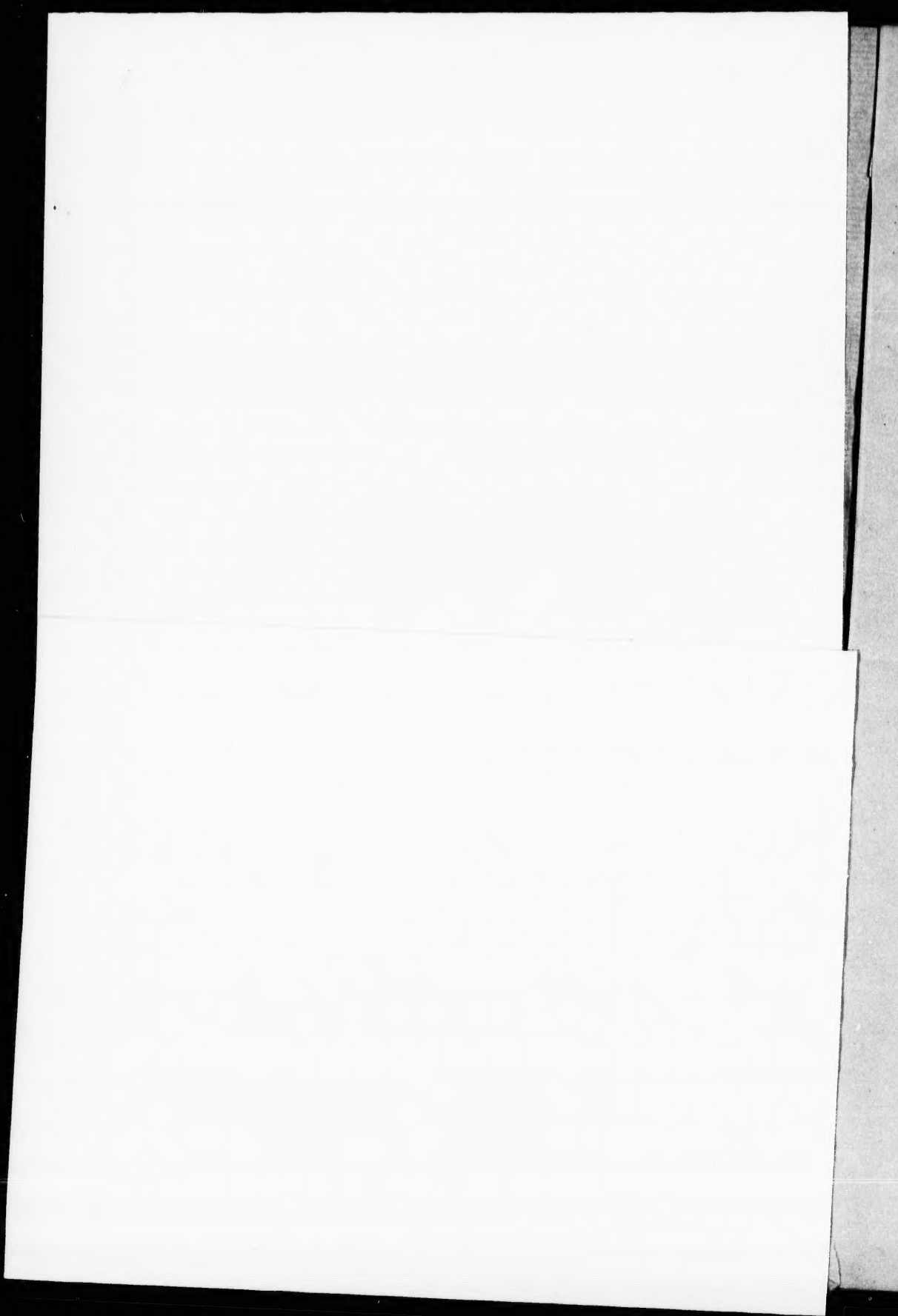
Respondent.

FACTUM OF THE APPELLANTS.

Filed 8 March 1860

QUEEN'S BENCH,

APPEAL SIDE.



PROVINCE OF CANADA, QUEEN'S BENCH,
LOWER CANADA, to-wit:
APPEAL SIDE.

JOHN ATKINS et al.,

APPELLANTS,

AND

THE QUEBEC BUILDING SOCIETY,

RESPONDENT.

FACTUM OF THE APPELLANTS.

The Appellants, opposants in the Court below have brought the present Appeal, to obtain the revision of the Judgment of the Superior Court at Quebec rendered on the 4th day of Nov. 1859, dismissing their opposition *afin d'annuler*, upon motion that the *fiat* of a the Respondents, and without permitting the opposants to prosecute their opposition to hearing.

This Judgment is not and does not purport to be grounded on any defects in form inherent in the opposition or any default to comply with the requirements of the rules of practice, but, though no motives are stated, was based on the assumption that the *fiat* of a Judge was necessary to enable the opposants to come before the Court, and otherwise, conceded all the positions of the opposants.

Now humbly conceiving that there is no law requiring such a *fiat*, and interests of great importance to the opposants being staked upon the decision, of this otherwise unimportant matter, the only course left to the opposants was to seek the reversal of that Judgment by this Court.

The case in the Court below will disclose the following facts. In the case of the Quebec Building Society vs. Louisa Smith et al, a *fiat* was issued, under which certain real property was taken in execution, the description of which in the Canada Gazette, was made to include a small portion of the property of one Smith, who succeeded in obtaining a *distriction* of that portion. The Plaintiffs continued the execution not by an *alias fieri facias* giving a new and correct description, but by a *venditioni exponas*, with the same description, but subject to the opposition *afin de distraire* of Smith.

This obvious nullity was taken advantage of by an opposition *afin d'annuler*, regular in form, substantive allegations and conclusions, and supported by the affidavit required by the rules of practice, which opposition was dismissed by the Court below, on motion, alleging two grounds, 1. That no permission of a Judge to file the opposition had been obtained, and, 2. That no opposition can by law be filed to a *venditioni exponas*.

Had this Judgment merely affected the course of proceeding to be followed by the Appellants, they might have acquiesced in it; but as the consequences were irremediable, and involved the sacrifice of their property, real estate of great value, the Appellants had no alternative but to seek a remedy in appeal.

The Appellants contend that the Judgment of the Court below is erroneous, there being, as before stated, no law requiring such supposed permission, and the enactment of the 41. Geo. 3. on the subject of oppositions not having any application to an opposition, the reasons of which are based upon the invalidity of the writ of *venditioni exponas* itself. Indeed it is manifest that the statute assumes the existence of a valid writ of *vend. ex.* and contemplates only causes of opposition arising *extrinsically*, never intending to enact the absurdity that such a writ, however defective and null, can under no circumstances be set aside. Accordingly the Courts have always taken this view and have without difficulty maintained oppositions to annul such writs, for causes invalidating the writ itself.

For these reasons the Appellants hope for a reversal of the Judgment appealed from.

ANDERSON & PARKIN.

Attorney for Appellants.

Quebec, February, 1860.

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